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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.16 of 2001

Sushil Kumar

Vs.

State of Chhattisgarh

JUDGMENT

Post for 23.07.2007

Sd/-
SUNIL KUMAR SINHA
Judge

Noted
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23/7

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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.16 of 2001

APPELLANT — Sushil Kumar s/o Kriparam Satnami, aged about 36 years, r/o village Pitora, P.S. Nandani, District Durg, Chhattisgarh.

Versus

RESPONDENT — State of Chhattisgarh, Through P.S. Nandani District Durg, Chhattisgarh

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Appearance:

Shri J. K. Shastri, counsel for the appellant.

Shri N.K. Mehta, Panel Lawyer, for the State.

JUDGMENT
(23.07.2007)

SUNIL KUMAR SINHA, J.

(1) By this appeal, a challenge is made to the judgment of conviction and order of sentence dated 21.12.2000 passed by the VI[th] Addl. Sessions Judge, Durg, in Sessions Trial No.244/2000, whereby the appellant has been convicted u/s 376 & 323 I.P.C., and sentenced to undergo R.I. for 10 years and to pay a fine of Rs.500/- in default of payment of fine, to further undergo R.I. for 3 months & R.I. for 3 months and to pay a fine of Rs.500/- in default thereof, to further undergo R.I. for 3 months with a further direction to run the sentences concurrently.

(2) The brief facts are that the prosecutrix, Dukalhin Bai (P.W.2) is a married lady, having 4 children. She was residing in the house of her in-laws in village Pitora since long back as her husband had gone to earn his livelihood. The spot map and the other evidence would show that about 25-26 persons, including the appellant, who is the brother-in-law (*Jeth* of the victim) were residing in different rooms of the common house which was the

ancestral property, in which the husband of the appellant was also having a share. The allegations are that on 12.6.2000 at about 11 p.m., when she was sleeping in her room alongwith her 3 children, the appellant went there, threatened her and committed forcible intercourse against her. She could not raise alarm at the time of commission of the sexual intercourse. However, when she started raising alarm after commission of the said act, by switching-on the lights, the appellant assaulted her with the wooden portion of *Tangia*, due to which, she received injuries. Out of fear, she could not disclose the incident to anybody and she did not go out of the house on account of fear. However, on 15.6.2000 at about 4 a.m., she any how managed to escape from the house and went to her parents place in village Domar and narrated the story to her mother Chhalla Bai, aunt Shanti Bai and uncle Ghasia Ram and thereafter, a first information report Ex.P.1 was lodged on 15.6.2000 at about 16.30 hours.

(3) During the course of investigation, she was sent for medical examination and was examined by Dr.(Smt.) Pratibha Dhani (P.W.4) who prepared her report Ex.P.3. According to her, there was an abrasion of about ½cm x ½cm over the left fore arm, back side the elbow and there was a contusion over the shoulder admeasuring 1" x 1". They were said to be caused by hard and blunt object within the duration of 4-5 days. No internal injuries were detected and vagina admitted two fingers easily. She prepared two slides from vaginal material and handed over for pathological examination. According to her, no definite opinion could be given about recent sexual intercourse. The site plan of the place of incident was prepared under Ex.P.2. The appellant was also sent for medical examination and was examined by Dr.Sahas Pandey (P.W.5) who prepared his report Ex.P.4, according to which, no external injuries were found on the person of appellant and the appellant was competent to perform sexual intercourse. After completion of usual investigation, the charge sheet was filed.

(4) The conviction of the appellant is based upon sole testimony of the prosecutrix (P.W.2).

(5) Learned counsel for the appellant argued and raised many points assailing the testimony of the prosecutrix.

(6) On the other hand, learned State Counsel opposed these arguments and supported the judgment of conviction and order of sentence passed by the sessions Court.

(7) The prosecutrix (P.W.2) has deposed that on the date of incident, her eldest son aged about 6 years had gone to the house of her parents and she was sleeping alongwith her 3 children. At about 11 p.m., the appellant entered into her room and gagged her mouth, removed her clothes and committed sexual intercourse against her. She could not raise alarm because her mouth was gagged. She further deposed that after commission of the sexual intercourse, the appellant had threatened her that if she will disclose the story to any other person, he will kill her. She also made allegations that she was beaten by the appellant with the wooden portion of a *Tangia*. She further deposed that due to fear she could not disclose this story to any other person. She has very specifically deposed vide para 3 that the appellant had locked the door from out side the room, but on the 2nd day at about 4 a.m., when he went out in Gali, she could anyhow come out to *Gali* and went to the house of Radha Bai in the village and from there she sent a message to her mother, who came to her village on the next day and then only she went to her parents place and from her parents place, she has gone to lodge the report.

(8) Learned counsel firstly argued that according to the evidence of the prosecutrix herself vide para 8 of her cross examination, about 25-26 persons including the appellant and his family members also, were residing in a common house, therefore, it was not possible to commit such an offence in one room of the common house. He also argued that according to the prosecutrix herself, 3 children were sleeping in the room

alongwith her and in this situation also commission of forcible sexual intercourse was not possible. He also refered to para 14 of her evidence, in which she has admitted that she had not come out of her house for two days and even she had not taken water and had not attended the call of nature including release of bladder pressure. Vide paras 18 & 19 of her cross examination, she was faced with the omissions made in the F.I.R., as also in her police statement Ex.D-2, to which she has denied. Vide para 22 of her cross examination, she has admitted the fact that she was restrained in the house for a day and the main gate of the house was locked by the appellant, but it was not told by her at the time of lodging of the F.I.R. Learned counsel for the appellant also referred to those paragraphs in which suggestions were given to her that she had illicit relations with the younger brother of the appellant namely Mugandas (her Dewar), therefore she was beaten by the family members of the appellant, hence the report was lodged.

(9) The conduct of the prosecutrix while recording such evidence appears to be quite unnatural. It does not appear to be natural or probable that in a small house of about 5-6 rooms, where 25-26 persons were residing, one of the female members would be raped by a male member, particularly in the night when all the members were present in the house. In that situation, if the alarm is raised by the victim, certainly the members of the house would be available to come to her rescue or atleast to ask as to what happened ? Not only this, the conduct of not raising alarm even after her release after the alleged rape also appears to be unnatural, particularly, when the prosecutrix is making allegations that thereafter she was beaten by the appellant by weapon due to which she received injuries. It is not a case in which it can be said that no body knew that the prosecutrix is there in the room. If we believe the version of the prosecutrix, then she was restrained in the room by locking from outside the room by the appellant for two days. If this is true, the other family members, who were residing in the same house must have noticed that the particular member is locked in

a room alongwith 3 children and they must have enquired about the reasons as to why she has been locked. There is no such evidence on record to substantiate this fact except that of the prosecutrix, which not only appears to be unnatural, but it clearly appears to be false. Such an event would only be possible when all the inmates of the house are united not to take notice of such fact which was allegedly going on in their house. In fact, it is quite unnatural and unbelievable. Besides the above, the deposition made by the prosecutrix vide para 14 also makes her testimony doubtful. She has stated that for two days she had neither taken water nor had gone to answer the call of nature or to release her bladder pressure, which does not appear to be correct. What the 3 children were doing, whether they were not making any cries etc., for food or water are the factors to be considered alongwith the story set-forth by the prosecutrix. Not only this, she has deposed that first of all, after her release, she went to Radha Bai, a lady in the same village, from where she called her mother, but Radhabai has not been examined in this case.

(10) So far as law is concerned, it is an old settled principle that overmuch importance cannot be given to minor discrepancies. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, therefore, cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses. Please see ***Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, AIR 1983 S.C. 753***. It is also well settled that when the version of the prosecutrix inspires confidence of the Court and the Court feels it proper to depend on her testimony, a conviction can well be based on it needing no corroboration thereof.

(11) In the present case, if we examine the entire evidence of the prosecutrix, in light of the other evidence on record and also in light of the all important "probabilities-factor", it would appear that her version and conduct are not natural and on

account of many post incidental factors pertaining to her conduct and features of the case, her such version does not inspire confidence of the Court so as to warrant a conviction on her sole testimony. In the opinion of this Court, the Sessions Court erred in law in depending upon the sole testimony of the prosecutrix for awarding the conviction to the appellant u/ss 376 & 323 of the I.P.C. The conviction and sentences awarded to the appellant on such testimony of the prosecutrix cannot be sustained.

(12) In the result, the appeal is allowed. The conviction and sentences awarded to the appellant are set aside. If the appellant is in jail, he shall be set at liberty forthwith, if not required in any other case.

Sd/-
SUNIL KUMAR SINHA
Judge

Rao